

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

Compensation Review Board

CRB No. 11-096

HUGHEY PAYNE,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Respondent

Appeal from a Compensation Order on Remand by
The Honorable Gerald D. Roberson
AHD No. 07-134A, OWC No. 631492

David M. Schloss,¹ Esquire, for the Claimant/Petitioner
Mark H. Dho, Esquire, for the Self-Insured Employer/Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE,² AND MELISSA LIN JONES, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

¹ Claimant was represented at the formal hearing by Joseph H. Koonz, Jr., Esq., of the same law firm.

² Judge Leslie has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

PROCEDURAL HISTORY AND FACTS OF RECORD

This appeal follows the issuance on August 18, 2011 of a Compensation Order on Remand (COR) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES). In that COR, Claimant's request for temporary total disability from August 29, 2006 to the present and continuing was granted in part with an award of TTD for the period August 29, 2006 to September 11, 2006.

Claimant was working as a station manager for Employer on August 29, 2006 when the air conditioning malfunctioned causing him to become dizzy, faint and weak. Claimant left work and has not returned. He filed a claim for disability benefits claiming the working conditions had aggravated his pre-existing asthma. In an October 31, 2007 Compensation Order, Claimant was awarded ongoing TTD benefits. Employer appealed to the CRB.

On January 28, 2008, the CRB affirmed the administrative law judge's (ALJ) conclusion that Claimant's condition was causally related to his work environment. However, the ALJ's conclusion that Claimant sustained an ongoing total disability was reversed and remanded owing to the ALJ's failure to allow the testimony of Employer's expert witness on the air quality in the metro station.

After an evidentiary hearing to receive the testimony of the expert witness, the ALJ issued a COR on April 30, 2008 where Claimant was awarded ongoing TTD benefits.³ This decision was affirmed by the CRB on September 3, 2008, which was then appealed to the D.C. Court of Appeals (DCCA).

On April 15, 2010, the DCCA determined that the CRB did not err in upholding that part of the ALJ's decision that excessive heat in the metro station exacerbated Claimant's asthma and rendered him temporarily disabled. On the issue of whether Claimant had an ongoing disability, the Court reversed the CRB's decision to uphold the ALJ's determination because the ALJ erroneously stated that Claimant's burden was to present substantial evidence of his entitlement to the requested level of benefits when the correct burden of proof was a preponderance of the evidence.⁴ On October 29, 2010, the CRB remanded the case to the Administrative Hearings Division (AHD) to make new findings of fact and conclusions of law to carry out the DCCA's decision.⁵

On December 10, 2010, the ALJ, in issuing a further COR, applied the correct standard of proof and determined that Claimant had established entitlement to ongoing TTD benefits due to his exposure to certain workplace conditions.⁶ Employer appealed and on August 4, 2011, the CRB vacated and remanded the COR to the ALJ to make specific findings as to the duration of the 2006

³ *Hughey Payne v. WMATA*, AHD No. 07-134A, OWC No. 631492 (April 30, 2008) (COR I).

⁴ *WMATA v. DOES*, 992 A.2d 1276 (D.C. 2010).

⁵ *Hughey Payne v. WMATA*, CRB No. 08-169(R) (October 29, 2010).

⁶ *Hughey Payne v. WMATA*, AHD No. 07-134A, OWC No. 631492 (December 10, 2011) (COR II).

workplace exposure or to determine whether the exposure permanently worsened Claimant's pre-existing condition.⁷

In taking up the matter on remand, the ALJ determined that Claimant no longer had residuals from the August 29, 2006 workplace incident and that this incident did not permanently aggravate his underlying pre-existing asthmatic condition. Accordingly, Claimant was awarded TTD benefits for the closed period August 29, 2006 to September 11, 2006.⁸ Claimant timely appealed with Employer filing in opposition.

Claimant argues as reversible errors on appeal that (1) the CRB exceeded its permissible scope of review in its August 4, 2011 Decision and Remand Order vacating the December 10, 2010 COR; (2) the CRB gave an improper instruction to the ALJ in limiting the exacerbation of Claimant's condition to one isolated incident instead of multiple incidents over time; (3) Claimant was not given the opportunity to present evidence on the ongoing nature and extent of his disability; and (4) the findings of fact in COR III are inconsistent with the findings in previous compensation orders. Employer argues to the contrary that the remand decision under review is support by substantial evidence and should be affirmed.

ANALYSIS

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁹ *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In stating his issues on appeal, Claimant argues in his first two assignments of error that the CRB committed errors in its August 4, 2011 Decision and Remand Order by exceeding its scope of review and by giving a limiting instruction to the ALJ. By proceeding in this manner, Claimant is using the Application for Review process improperly to appeal a CRB decision to the CRB, when filing a motion for reconsideration as provided by 7 DCMR § 268.1¹⁰ would have been more appropriate. Although the CRB has no authority to review its own decisions on appeal, we will

⁷ *Hughey Payne v. WMATA*, CRB No. 11-002, AHD No. 07-134A, OWC No. 631492 (August 4, 2011).

⁸ *Hughey Payne v. WMATA*, AHD No. 07-134A, OWC No. 631492 (August 18, 2011) (COR III).

⁹ "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

¹⁰ 7 DCMR § 268.1 states: Any party may, within ten (10) calendar days from the date shown on the certificate of service of the Decision and Order of the Board or of any order issued by the Board, file a request for reconsideration thereof with the Clerk of the Board

proceed to address Claimant's arguments as they are related to the August 18, 2011 COR under review.

In the first assignment of error, Claimant argues that in its August 4, 2011 decision vacating the December 10, 2010 COR, the CRB "exceeded its permissible scope of review because it required the ALJ to make findings which the D.C. Court of Appeals did not instruct the agency to make on remand."¹¹ Specifically, Claimant asserts that instead of remanding to the ALJ to apply the preponderance of the evidence standard of proof to Claimant's evidence on the nature and extent of his disability, the CRB instructed the ALJ to address the issue of whether the workplace exposure worsened Claimant's preexisting condition, which was not part of the DCCA's instruction. We find no merit in this argument.

In holding that the ALJ had "misapprehended Payne's burden of proof", the Court went on to state "[t]he ALJ made no finding as to whether Payne proved by a preponderance of the evidence that his disability was ongoing."¹² The Court further stated

We could avoid a remand if we were able to make a legal determination that the evidence compelled a determination that Payne met (or failed to meet) his burden of proof as to his claim that workplace conditions prevent him from returning to work.¹³

The Court also held that the ALJ's reliance on its holding in *Howard University Hospital v. DOES*¹⁴ would be inapposite "[i]n the absence of a finding that conditions in the workplace were the cause or permanently worsened Payne's asthma or rendered him more susceptible to irritants."¹⁵ The Court proceeded to summarize the competing evidence in the record and stated that it was the role of the ALJ to weigh this evidence and "determine whether or not the preponderance of the evidence supported a finding of ongoing disability."¹⁶ As the CRB's instruction to the ALJ to make findings as to "whether the exposure worsened Claimant's preexisting condition" is subsumed in the finding of Claimant's ongoing disability, the CRB did not exceed its permissible scope of review and no error is found.

¹¹ *Memorandum of Points and Authorities in Support of Claimant's Application for Review and Request for Evidentiary Hearing*, p. 5.

¹² *WMATA v. DOES*, *supra*, at 1282.

¹³ *Id.* at 1283.

¹⁴ In *Howard University Hospital v. DOES*, 881 A.2d 567, 573 (D.C. 2005), the Court held that "where a claimant's allergic condition arises out of and is causally related to her employment, she continues to suffer from a compensable disability so long as she cannot return to her job (or obtain a monetarily equivalent job), even if her allergic symptoms have subsided and the only thing that prevents her from going back to work is the danger that her symptoms will recur if she does."

¹⁵ *Id.*

¹⁶ *WMATA v. DOES*, *supra*, at 1286.

Claimant's second assignment of error is that the CRB erroneously based its instructions to the ALJ on the assumption that Claimant's condition was exacerbated by one isolated incident, when in fact there were multiple incidents which led to the permanent aggravation of Claimant's condition. We disagree.

In the CRB's August 4, 2011 remand decision which Claimant takes issue with, the CRB specifically noted that the DCCA affirmed the ALJ's finding that the workplace conditions on August 29, 2006 exacerbated Claimant's pre-existing asthma and rendered him temporarily disabled. In keeping with this holding, the CRB also noted that the current state of the law in this jurisdiction is that the injured worker is entitled to disability benefits only for the duration of that acute episode, unless the workplace exposure caused a permanent worsening of the pre-existing condition.¹⁷

It was thus and has been settled in this case that, apart for any prior workplace events where the conditions affected Claimant's pre-existing asthma, it was the specific conditions on August 29, 2006 that caused the aggravation forcing him to leave work. Thus, as the CRB stated in its August 4, 2011 remand, the ALJ needed to "analyze the evidence in accordance with the DCCA's *Howard University* and *Washington Post* decisions or the CRB's *Anameleche-Oladokun* decision."¹⁸ Claimant's claim for disability benefits is predicated on the exposures he experienced on the day in question. This was an acute episode and it from this acute episode that all further finding emanate as to duration of any disability resulting from this episode and whether this episode resulted in a permanent worsening of Claimant's pre-existing condition. As such the CRB's instructions to the ALJ on remand were proper and no error is found.

Claimant next asserts that he was never given the opportunity to present evidence as the ongoing nature and extent of his disability because the issue was never raised at the hearing. Claimant's claim for relief has always been for temporary total disability from August 29, 2006 to the present and continuing. Inherent in this claim is Claimant's assertion that he has a disability that is ongoing. Accordingly, it has been his burden from the outset to prove by a preponderance of the evidence that he has the disability claimed and that the disability is ongoing. Claimant raised the issue in making his claim for relief and it was heard at the initial hearing in this matter. There is no merit in this assignment of error.

Finally, Claimant argues that the findings of fact in the August 18, 2011 COR are "wholly inconsistent with the findings of fact in the previously issued compensation orders."¹⁹ In the COR under review, the ALJ's initial statement in the findings of fact was

The findings of fact and conclusions of law set forth in the October 31, 2007 Compensation Order, the April 30, 2008 Compensation Order on Remand and the December 10, 2010 Compensation Order on Remand are

¹⁷ See *Anameleche-Oladokun v. D.C. Public Schools*, CRB (Dir. Dkt.) No. 09-04, AHD No. PBL 04-002A, DCP No. LT7-BOEdu004741 (March 14, 2006).

¹⁸ *Hughey Payne*, CRB No. 11-002, at 5.

¹⁹ Claimant's *Memorandum of Points and Authorities*, p. 10.

hereby adopted and incorporated by reference, to the extent that they are not abrogated by the Decision and Order rendered by CRB.

The CRB remand which precipitated the COR under review faulted the ALJ for not making specific findings as to the duration of the 2006 workplace exposure and for not determining whether that exposure worsened Claimant's pre-existing condition. To the extent any of the new findings in COR III spoke to either they would not be inconsistent, as any prior similar finding would have been abrogated.

The first inconsistent finding identified by Claimant is the ALJ's finding in COR III that his pre-existing asthmatic condition was not permanently aggravated by the August 29, 2006 exposure conflicts with the finding in COR II that his symptoms began after he started working as a manager at the Foggy Bottom metro station. We find no inconsistency here. There is a clear distinction in these findings as one stated when Claimant's symptoms began and the other is a determination that after the exposure on August 29, 2006, the pre-existing condition was not permanently aggravated.

As to the second instance of inconsistent findings, Claimant points to the ALJ's finding of no residuals from the work incident in COR III and the finding in COR II that the evidence established that he has such residuals. While these are ostensibly at odds, they must also be considered in the context of both remand decisions that the ALJ found that Claimant was released to return to work with restrictions. As such, any inconsistency is rendered harmless.

Finally, there is no inconsistency in the last example raised by Claimant. In COR III, the ALJ found that the August 29, 2006 work incident did not permanently aggravate Claimant's pre-existing condition. Contrary to Claimant's assertion, this does not contradict prior findings that Claimant's asthma is permanent and that repeated workplace exposures had rendered Claimant symptomatic and unable to work. Accordingly, no error is found.

CONCLUSION AND ORDER

The Compensation Order on Remand of August 18, 2011 is supported by substantial evidence and is in accordance with the law. Accordingly, it is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

May 2, 2012
DATE